STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2006
v	No. 262242 Monroe Circuit Court
DONALD LEE RHODUS, Defendant-Appellant.	LC No. 04-033671-FH

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of manufacturing methamphetamine (meth), MCL 333.7401(2)(b)(i), operating or maintaining a meth lab, MCL 333.7401c(2)(a), possession of meth, MCL 333.7403(2)(b)(i), and possession of less than 25 grams of cocaine, MCL 333.7403(a)(v). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 10 to 30 years' imprisonment for the manufacturing conviction, 10 to 15 years' imprisonment for the operating or maintaining a meth lab and possession of meth convictions, and to four to six years' imprisonment for the possession of cocaine conviction. We affirm.

Defendant's convictions arise from the discovery of a meth lab in the apartment in which he was living with his son, Mark Kelly Rhodus, who was also convicted of the same offenses (except possession of cocaine).

Defendant first contends that the prosecution presented insufficient evidence to support his various convictions. When reviewing a claim that insufficient evidence was presented to support a defendant's conviction, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find all of the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

Viewing the evidence in the light most favorable to the prosecution, the prosecution presented sufficient evidence to support defendant's convictions for all four offenses. First, the prosecution presented sufficient evidence that defendant "possessed" meth and cocaine. "A person need not have actual physical possession of a controlled substance to be guilty of

possessing it. Possession may be either actual or constructive." *Wolfe, supra* at 519-520. Moreover, possession does not require ownership, and "may be joint, with more than one person actually or constructively possessing a controlled substance." *Id*. at 520. To establish constructive possession, the prosecution must show that defendant had the right to exercise control of the controlled substance and knew that it was present. *Id*.

The police found meth on the end table next to defendant and found meth and cocaine in several locations around the apartment's guestroom. Defendant had been staying in the guestroom for approximately six weeks at the time of his arrest and clearly knew that the drugs were present. Defendant's control over the room was evinced by the discovery of his belongings in that room. Megan McCartney, the girlfriend of Mark Rhodus, testified that it was defendant's idea to construct a meth lab and that defendant spent a lot of time in the guestroom, and that defendant provided meth for her to sell on one occasion. Moreover, defendant was using meth at the time of the police raid. Given this evidence, we find that there was sufficient evidence for a rational jury to conclude that the defendant possessed both meth and cocaine, at least constructively and jointly with his son and McCartney.

The evidence was also sufficient to support defendant's convictions of manufacturing meth and operating or maintaining a meth lab. The meth lab and equipment were in an area that defendant temporarily possessed and over which he temporarily exerted control. In conjunction with McCartney's testimony that it was defendant's idea to construct a meth lab and regarding the amount of time defendant spent in that room, the prosecution presented sufficient evidence to support defendant's convictions.

Defendant also challenges the sufficiency of the evidence because most of the substances found in the guestroom were not scientifically tested. But the statutes proscribing the possession, delivery, and manufacture of meth apply regardless of the quantity involved. Because meth was found among the samples tested, the evidence supported defendant's convictions. Moreover, the vast amount of base ingredients and equipment found inside the apartment would permit a rational jury to conclude that defendant was operating a meth lab.

Defendant further contends that he was denied his right to a unanimous jury verdict because the court gave only a general unanimity instruction despite the fact that the prosecution based the charges for operating or maintaining a meth lab and possession of meth on various underlying events. Although defendant ultimately expressed his satisfaction with the jury instructions as given, the trial court earlier recognized defendant's objection to the operating or maintaining a meth lab instruction. Because defendant objected to the instruction in relation to that charge, his challenge is preserved for appellate review. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Defendant never objected to the possession instruction on this ground. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) ("An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground."). Yet, defendant did not explicitly express satisfaction in response to this proposed instruction. So, defendant has forfeited his right to full appellate review of that instruction. *Carter*, *supra* at 215-216.

We review a claim of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are reviewed as a whole to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

However, this Court reviews unpreserved instructional challenges for plain error affecting the defendant's substantial rights. *Id.* at 124-125. To avoid forfeiture, (1) an error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the error affected substantial rights, meaning the error affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A defendant in a criminal case is entitled to a unanimous jury verdict. *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996). "In order to protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement." *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). But a trial court is not required to give a more detailed unanimity instruction merely because a single charge could be based on more than one underlying event. *Id.* at 512. "The critical inquiry is whether either party has presented evidence that materially distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice." *Id.* at 512-513.

In this case, defendant was originally charged and convicted of operating or maintaining a meth lab under MCL 333.7401c. When discussing the jury instructions, the trial court agreed with the prosecutor that the evidence could support a finding of guilt on any of the three alternatives under the statute, MCL 333.7401c(1)(a), (b) and (c). The *Cooks* Court found multi-theory statutes analytically distinct, and noted when "'a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory.'" *Cooks*, *supra* at 515 n 16, quoting *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991). Here, the court described each alternative separately to the jury and twice told the jury that it needed to find that the prosecutor had "proven each and every element beyond a reasonable doubt of any one these alternatives." The court also informed the jury that the prosecutor had not charged defendant with possession of meth he was actually using when the police entered the apartment.

We find that the court's instructions were sufficient to inform the jury of the unanimity requirement and that more specific instructions were not required in this case. The bulk of the evidence relevant to defendant's convictions for possession of meth and operation or maintenance of meth lab revolved around the discovery of equipment, ingredients, and finished product in the guestroom where defendant slept. Defendant's dissection of the evidence into separate theories is specious.

Defendant also challenges his sentences on appeal. Defendant first contends that the sentencing court erroneously assessed ten points for offense variable (OV) 13 because he had not committed three or more previous crimes against a person or property or drug crimes within the requisite five-year period and because he was not part of an organized criminal group. Defendant contends that the sentencing court erroneously scored ten points for OV 14 because there was no evidence that he was the leader in this situation. Defendant further argues that defense counsel was ineffective for failing to object to these purported errors, thereby causing

them to be unpreserved for appellate review. See MCL 769.34(10); *Kimble, supra* at 311. We further note that defendant failed to preserve his challenge to counsel's performance by moving for a new trial or *Ginther*[1] hearing in the trial court. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Generally, it is within the sound discretion of the sentencing court to determine the number of points to be assessed for a given sentencing variable "provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We must uphold the sentencing court's decision where there is "any evidence" to support that score. *Id.* But where a challenge to the scoring of an offense variable was not preserved by a timely objection, our review is limited to plain error affecting defendant's substantial rights. *Kimble, supra* at 312.

Absent a *Ginther* hearing, our "review of the relevant facts is limited to mistakes apparent on the record." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *Id*. at 140; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of proceedings would have been different. *Id*. at 599-600.

OV 13 is scored, in relevant part, as follows:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
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> * * *
>
> (c) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii)..... 10 points
>
> (d) The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group..... 10 points
>
> (e) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii)..... 10 points
>
> * * *
>
> (g) No pattern of felonious criminal activity existed..... 0 points

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction. [MCL 777.43.]

After reviewing defendant's presentence investigation report (PSIR), we agree with defendant that he does not have the requisite three convictions in the five years before the sentencing offense to support a score of ten points on that ground. Although defendant has been convicted of four drug-related offenses since September 29, 1999, there is no indication that any of those offenses fall within the limited range of controlled substance offenses under OV 13.

Nevertheless, we find that there was record evidence to support the score based on defendant's involvement in an "organized criminal group." We would first note that defendant's reliance on *People v Reddish*, 181 Mich App 625; 450 NW2d 16 (1989), and *People v Johnson*, 144 Mich App 497; 376 NW2d 122 (1985), is unfounded. Those cases addressed the judicial guidelines variables regarding a defendant's participation in a "professional" or organized crime ring. See *Reddish*, *supra* at 628; *Johnson*, *supra* at 500-501. The instructions for that variable also directed courts not to "automatically" define a situation with multiple offenders as an "organized criminal group." *Johnson*, *supra* at 501. MCL 777.43 does not include the word "professional," and the Legislature has not cautioned courts against dubbing a multiple offender situation as an "organized criminal group." Rather, MCL 777.43(2)(b) specifically instructs, "[t]he presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense. that has also been removed."

We find the evidence supports the sentencing court's score in this regard. McCartney testified that defendant and Mark Rhodus spent a lot of time together in the guestroom, where the meth lab was located. McCartney sold meth manufactured in the lab on at least two occasions. McCartney also testified that the trio went shopping together to purchase the supplies to manufacture meth. An investigating officer described the lab as "good-sized" for a clandestine operation. Although the "organization" was small and likely relatively unsophisticated, the trio did join together to manufacture and sell meth.

A court may score ten points under OV 14 for a defendant's leadership role in a multiple offender situation. MCL 777.44(1)(a). Because three individuals were charged in this situation, the court could find that more than one offender was a leader. MCL 777.44(2)(b). The record evidence also supports the sentencing court's score in this regard. McCartney testified that defendant had control over the guestroom in which he slept. She also testified that the scheme to manufacture meth was defendant's idea. It is undisputed that the meth lab was constructed in the guestroom. Accordingly, the evidence supported the sentencing court's finding that defendant

was actively involved in operating a lab to manufacture meth, and that both defendant and Mark Rhodus were leaders in this situation.

Finally, defendant contends that the sentencing court improperly departed upward from the minimum sentences guidelines ranges as to his convictions for operating or maintaining a meth lab and possession of meth. We disagree.

Defendant does not contest his sentence of 10 to 30 years' imprisonment for delivery or manufacture of meth. This sentence for a class B felony was within the appropriate guidelines recommended minimum sentence range of 78 to 162 months, and must be affirmed. MCL 769.34(10). We conclude that defendant's sentence of 10 to 15 years' imprisonment for the operating or maintaining a meth lab was similarly within the appropriate guidelines recommended minimum sentence range. The sentencing information report (SIR) prepared for this offense used a class D guidelines grid, which resulted in a recommended minimum range of 19 to 47 months for OV level III and prior record variable (PRV) level E. Although the information the prosecutor filed in this case only gave notice that the crime of operating or maintaining a meth lab was a 10-year felony, because the drug involved is methamphetamine, it is actually a 20-year class B felony. Therefore, the SIR for operating or maintaining a meth lab should have indicated the appropriate guidelines recommend minimum sentence range of 78 to 162 months, just as for delivery or manufacture of methamphetamines.

The penalty for violating MCL 333.7401c(1), operating or maintaining a drug lab, is set forth in MCL 333.7401c(2)(a). That subsection states: "Except as provided in subdivisions (b) to (f), by imprisonment for not more than 10 years or a fine of not more than $100,000.00, or both." Subsection f, MCL 333.7401c(2)(f), provides: "If the violation involves or is intended to involve the manufacture of a substance described in section 7214(c)(ii), by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both." Section 7214c(ii), MCL 333.7241c(ii), includes "[a]ny substance which contains any quantity of methamphetamine, including its salts, stereoisomers, and salts of stereoisomers." When the punishment for this charge is established by MCL 333.7401c(2)(f), it is a class B controlled substance offense. MCL 777.13m. Thus, because defendant was convicted of operating or maintaining a methamphetamine lab, the appropriate sentence guidelines crime class is B. As a second habitual offender, defendant's minimum sentencing guidelines range should have been 78 to 162 months. MCL 777.63. Because defendant's minimum sentence of 10 years' imprisonment is within the appropriate guidelines sentence range, we must affirm. MCL 769.34(10).

We note that even if because the prosecutor did not give defendant notice of the correct statutory punishment provision, the lower crime class sentence guidelines grid were applied to defendant's conviction for the operating or maintaining a meth lab, we would reach the same result. The sentences the trial court imposed for the offenses of operating or maintaining a meth lab and possession of meth were concurrent with and equal to or less than a lawful sentence imposed that was within the guidelines recommended range for a higher class felony, delivery or manufacture of meth. Therefore, error warranting reversal did not occur. See MCL 771.14(2)(e), and *People v Mack*, 265 Mich App 122, 125-128; 695 NW2d 342 (2005).

Defendant in a pro per brief contends that the prosecutor mischaracterized evidence and that defense counsel improperly failed to object. Specifically, defendant contends that the prosecutor attempted to prove that defendant lived in the raided apartment based on a letter

addressed to defendant. But the parties stipulated, and the trial court instructed the jury that the letter was addressed to a Missouri, not a Michigan, address. Accordingly, the prosecutor did not mischaracterize the evidence at trial and defense counsel had no grounds for objection.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot